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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 334

SAMUEL JAMES GASWAY,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioner was charged by indictment (R. 1) and found guilty of rape (R. 9, 10) after a trial in the 47th District Court of Potter County, Texas. He was sentenced to death by electrocution (R. 10). Upon appeal to the Court of Criminal Appeals of Texas, the conviction was affirmed and two motions for rehearings overruled.[1]

Here petitioner assigns as error the admission of two allegedly involuntary confessions into the evi-

[1] *Gasway v. State*, 248 S. W. 2d 942 (Tex. Crim. 1952).

dence at his trial. Because of this, he asserts that he was denied due process of law.

There is no substantial dispute in the evidence of the circumstances under which each confession was made. Petitioner does not claim that he was physically abused or even threatened with mistreatment. Instead it is asserted that the mere sequence of events constituted some form of psychological pressure which induced the petitioner to confess his guilt and thus render his statements inadmissible in evidence under the due process clause of the Fourteenth Amendment. However, the facts contained in the record of this case conclusively establish that each of petitioner's confessions was free from the taint of any form of coercion, psychological or otherwise. And in the absence of coercion the most that may be said for petitioner's complaint is that he made one confession while held in violation of a Texas statute. While this, of course, is one factor which may be considered in determining the admissibility of any purported confession, it is well established that illegal detention alone is not a sufficient ground to render it inadmissible.

The petitioner has been extended every constitutional and statutory privilege to which one charged with a capital offense is entitled. The issue of the voluntariness of a confession is one of fact to be resolved by the jury acting under a proper instruction from the court. Such was the procedure followed in the trial of this case, and the question of coercion, if we consider that such could have been seriously presented, was decided adversely to the petitioner.

STATEMENT OF THE CASE

The facts concerning the offense itself are of no importance to a determination of the issues presented here and may be found in detail on pages 943 and 944 of the opinion below.[2] Suffice it to say that petitioner was convicted of the rape of a nine year old girl whom he enticed into his automobile after having accosted her while she was delivering newspapers on the outskirts of Amarillo, Texas.[3] He made two detailed confessions of guilt, and testified in his own behalf at his trial. As a witness, he admitted that certain portions of his confessions were true, denied the veracity of some and "couldn't remember" others. The Court of Criminal Appeals found the evidence adduced at the trial strong enough to support the conviction even without the added strength of the confessions in question.[4]

The crime was widely publicized in Amarillo and its environs, and after several days' intensive investigation the Sheriff's Department received a tip to the effect that petitioner might be the guilty party. On Saturday, June 30, 1951, several of the Sheriff's deputies called at petitioner's home and talked to his mother, but being informed that he was elsewhere they left word for him to call Sheriff Gaither upon his return (R. 21, 22). When he returned home, petitioner called the Sheriff and then walked over to his office (R. 22, 107). This was about 2:30 in the afternoon.

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[2] This portion of the opinion below may also be found R. 132-135.

[3] Petitioner's confessions may be found R. 124-132.

[4] 248 S. W. 2d at p. 944.

Petitioner was placed in a "line-up" in the county jail and identified by the prosecutrix as her attacker (R. 17, 65). Shortly thereafter he acceded to a suggestion that he go to Austin, the State Capital and headquarters of the Texas Department of Public Safety, and take a lie detector test (R. 39, 63, 94). Apparently the Department possesses the only polygraph machine in the State; at any rate, there are none of these devices in Potter County (R. 50). Petitioner asked to take the test (R. 39), and before he went to Austin he voluntarily executed a written agreement to do so (R. 123). His mother was informed of these plans before he left (R. 23, 77).

At this juncture it should be noted that another suspect in the same case had been taken to Austin for a similar test only a few days before. He had been tentatively identified by the prosecutrix but was cleared by the polygraph and released upon his return to Amarillo (R. 53).

Late Saturday afternoon Sheriff Gaither, his deputy Carthel, and petitioner started for Austin (R. 18, 68), where they arrived early the next morning (R. 19, 66). The primary motive for the immediate departure and subsequent trip at night was to avoid the Texas summer heat (R. 40). A lie detector test is accurate only if the subject is well rested, and a 500 mile automobile trip in the heat of a July day in Texas is exhausting. It is true that in Austin petitioner was placed in a jail cell by himself, but this accomodation was in no way comparable to those which are commonly used for punishment purposes in penitentiaries (R. 19). He did not complain of any sort of discomfort while in "solitary." The offi-

cers accomodated him thus merely because they wanted him to have 24 hours of rest before undergoing the polygraph test the next morning (R. 40, 68). This is substantiated by the testimony of the polygraph operator to the effect that he would not test any person who was not completely rested (R. 58).

Petitioner took the lie detector test on Monday morning, and it was administered by a technician, not a police officer (R. 57, 95). The test lasted approximtely one hour and fifty minutes, of which forty-eight minutes were consumed by questioning, and the remaining sixty-eight by brief intervals of rest (R. 96, 97). Petitioner was not threatened or browbeaten in any way (R. 56, 57), and during the course of the test he was allowed to smoke, take refreshment, and to go to the rest room (R. 97). At the termination of the test, the petitioner and his custodians had lunch in the employees' cafeteria at the Department of Public Safety headquarters (R. 43, 70) and then returned to the polygraph room, where petitioner had a brief private conference with the technician (R. 43, 57, 70). After a few minutes he emerged and told the Sheriff he wanted to make a statement.

The petitioner was informed that the polygraph indicated that he had lied on key questions (R. 42), and being confronted with this he decided to make his first confession.[*] He was told that his statement must be entirely free and voluntary and duly

[*] The operator testified, contrary to petitioner's assertion in his footnote 3, that the polygraph used by the Department of Public Safety had proven 99.26 per cent accurate on past performances (R. 101).

warned that anything he might say could be used against him later (R. 47). The confession was made in the presence of three witnesses and was not given in exchange for any sort of promise of future leniency.*

Later in the day petitioner, Gaither and Carthel started back to Amarillo and spent Monday night in Plainview, a town along their route (R. 44, 49, 71). They arrived in Amarillo the next morning and went directly to the home of Mrs. Ivy Wilkinson, a Justice of the Peace, to file formal charges against petitioner (R. 24, 31, 72). The complaint was filed first and then petitioner made his second confession, this time to the District Attorney (R. 32, 72). Again he was duly warned that his statement must be purely voluntary and that it could later be used against him (R. 32). Shortly after this, the Sheriff went to petitioner's home and informed his mother of the events which had transpired since she had last seen him (R. 77).

There is no doubt but that petitioner was exceptionally well treated during all of this time. The Sheriff testified that "I have known him since he was a kid." (R. 76). Petitioner's mother testified that she had been told on Saturday afternoon that her son was going to Austin to take the lie detector test (R. 23). He was well cared for both going and returning (R. 20, 67, 72), and on the way back he was treated to a two dollar steak at the expense of Potter County (R. 71). He did not object to taking the poly-

* In accordance with Article 727, Texas Code of Criminal Procedure (Vernon 1948), reproduced in the Appendix, pages 16, 17.

graph test, but, on the contrary, he wanted to do so (R. 99). Neither was he mistreated or intimidated when he returned to Amarillo and made his second confession. Mrs. Wilkinson, the Justice of the Peace, testified that petitioner was "treated royally," and that "I even served soft drinks." R. 30).

There is some dispute in the evidence concerning discussions of the possibility of petitioner taking sodium penethol, the "truth serum" but if the subject was brought up at all, it appears that petitioner expressed a definite desire to take the drug (R. 44, 92, 93, 121, 122). He himself testified, "I told him it sounded all right with me, that I wasn't worried about sodium penethol." (R. 110)

The court below his reviewed the facts in a concise and lucid manner (R. 136-1[illegible]), and we have perhaps belabored them too exhaustively. However, this was done only in the effort to include references appropriate portions of the record and to demonstrate the utter lack of any evidence of coercive tactics on the part of petitioner's custodians. Perhaps the most important conclusion that may be drawn from a review of these facts relates to the intent of the Sheriff in taking petitioner to Austin. The two men were acquaintances of many years' standing, and only a few days before, another suspect in the same case was set free on the basis of the result of a similar polygraph test.

POINT ONE

The admission of petitioner's two confessions into the evidence at his trial did not deny him due process of law.

ARGUMENT AND AUTHORITIES

The admission of an involuntary confession into the evidence of a state criminal trial denies the accused due process of law.[7] Both this Court and the Texas Court of Criminal Appeals properly abhor coerced confessions, and a Texas statute[8] allows such a statement to be used in evidence only if made freely and without compulsion. Another statute[9] renders inadmissible evidence obtained in violation of the Constitution of the United States, and the Court of Criminal Appeals has never been reluctant to reverse a conviction if the undisputed facts show that the accused was compelled to confess his guilt.[10] A glance at the cases cited in the preceding footnote also reveals that the Texas Court has based its conclusions upon the pertinent decisions of the Supreme Court of the United States.

In Texas the initial question of the admissibility of a confession is for the court to decide. But when

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[7] *Harris v. South Carolina*, 338 U. S. 68 (1949); *Turner v. Pennsylvania*, 338 U. S. 62 (1949); *Watts v. Indiana*, 338 U. S. 49 (1949); *Haley v. Ohio*, 332 U. S. 596 (1947); *Malinski v. New York*, 324 U. S. 401 (1945); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Ward v. Texas*, 316 U. S. 547 (1942); *Vernon v. Alabama*, 313 U. S. 547 (1941); *Lomax v. Texas*, 313 U. S. 544 (1941); *White v. Texas*, 310 U. S. 530 (1940); *Canty v. Alabama*, 309 U. S. 629 (1940); *Chambers v. Florida*, 309 U. S. 227 (1940); *Brown v. Mississippi*, 297 U. S. 278 (1936).

[8] Article 726, Texas Code of Criminal precedure (Vernon 1948), reproduced in the appendix, page 16.

[9] Article 727a, Texas Code of Criminal Procedure (Vernon 1948), reproduced in the appendix, page 16.

[10] *Prince v. State*, 231 S. W. 2d 419 (Tex. Crim. 1950); *Colley v. State*, 158 S. W. 2d 1014 (Tex. Crim. 1942); *Abston v. State*, 139 Tex. Crim. 416, 141 S. W. 2d 337 (1940).

the voluntary or involuntary character of the confession becomes an issue of fact, the question must be submitted to the jury by appropriate instructions. A verdict of guilty thus constitutes a finding that the statement was voluntarily made." The circumstances under which a prisoner has confessed his guilt will also be examined by this Court. In ruling on the admissibility of a confession in terms of due process of law, the Court will predicate its conclusions upon an independent examination of the undisputed facts in the record."

In the instant proceeding, there is practically no dispute as to the nature of the circumstances surrounding either of the two confessions which were used in evidence. As a witness at his own trial and as a petitioner to this Court, Gasway has admitted that he was treated considerately. His chief custodian was a personal friend of many years' standing, who, instead of perpetrating some subtle form of psychological coercion to elicit a confession of guilt, was apparently attempting to give petitioner every possible opportunity to clear himself.

In view of the total absence of any evidence indicating that petitioner was mistreated, the cases upon which he relies" can harly be considered to be in point. A brief examination of the facts of these cases dis-

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" *Gipson v. State*, 147 Tex. Crim. 428, 181 S. W. 2d 76 (1944); *Taylor v. State*, 141 Tex. Crim. 212, 147 S. W. 2d 800 (1941); *Cantu v. State*, 141 Tex. Crim. 99, 135 S. W. 2d 705 (1940); *Stewart v. State*, 124 Tex. Crim. 632, 64 S. W. 2d 782 (1933).

" Citations at note 7, *supra*.

" *Watts v. Indiana*, 338 U. S. 49 (1949); *Ward v. Texas*, 316 U. S. 547 (1942); *Lomax v. Texas*, 313 U. S. 544 (1941); *White v. Texas*, 310 U. S. 530 (1940); *Chambers v. Florida*, 309 U. S. 227 (1940).

closes that each reversal was predicated on circumstances which are not at all comparable to those upon which petitioner places reliance here.

The petitioner in the *Watts* case was held illegally for six days. He was subjected to successive night-long ordeals of questioning by relay after relay of police officers, and for two days he was kept in a solitary jail cell described as "the hole," in view of the accommodations it provided. "Disregard of rudimentary needs of life—opportunities for sleep and a decent allowance of food—are also relevant."[11] At length the accused succumbed to such inquisitorial tactics and made the statement sought by the officers.

In the *Ward* case it was admitted that the accused, an ignorant Negro farm hand, had been slapped by a constable at least once, and that he remained in the custody of that particular officer for some time thereafter. For three days he was moved from jail to jail, from one strange town to another, all of this time being taken farther and farther from the scene of the crime. When the confession was finally obtained, he and his custodians were at a point some 110 miles distant from where he should have been held in custody. The only apparent reason for this tour was to frighten and intimidate the accused."[12]

The facts upon which the Court predicated reversal in the *Lomax* case are not readily discernible from the opinions of the Courts,[13] but it does appear

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[11] 338 U. S. at p. 53.

[12] 316 U. S. at pp. 550, 551.

[13] This Court delivered only a brief *per curiam* opinion without a recitation of the facts. For this information, reference is made to *Lomax v. State*, 144 S. W. 2d 555, 563, 564 (Tex. Crim. 1940).

that the petitioner had been forced to submit to an interrogation standing up and stripped of his clothing. In the *White* case, the accused was repeatedly removed from jail for nightly trips "out on the road" and "off of the road" into the woods for questioning. A local peace officer testified that he was taken from jail in this manner so many times that the exact number could not be recalled.[17] The petitioners in the *Chambers* case were subjected to protracted questioning "under circumstances that were calculated to break the strongest nerves and the stoutest resistance." After steadfastly maintaining their innocence for five days, they finally broke down and confessed after an all night interrogation.[18]

"A statement to be voluntary of course need not be volunteered."[19] Certainly the record before us cannot be said to reflect the mistreatment, intimidation, and abuse to which the petitioners in the foregoing cases were subjected. The petitioner does not claim that he was subjected to any sort of protracted "grilling" by successive shifts of police officers. Only during the polygraph test in Austin was he subjected to any sort of serious interrogation. This was apparently done at his own request, and he gave his written consent to take the test. Petitioner was interrogated by a scientifically trained technician who conducted the test as carefully as a physician would make a medical examination. Being confronted with the result that he had been lying on key questions, he decided to make his confession.

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[17] 310 U. S. at pp. 532, 533.
[18] 309 U. S. at pp. 238, 239.
[19] *Watts v. Indiana, supra,* p. 53.

The vast majority of cases in which petitioners presented unsuccessful complaints of coerced confessions have doubtless been disposed of by denial of certiorari, and it would add nothing to this brief to compile those cases here. However, there are several recent decisions in which this Court has affirmed such convictions with written opinions.[9] In each one of these cases there was presented a much more convincing argument for reversal than that which is raised in the instant proceeding.

In the absence of undisputed evidence or even a strong allegation of coercion, the only complaint left open to petitioner is the fact that he made his first confession before he was formally charged with the commission of the crime.[10] A confession obtained under these circumstances is, of course, inadmissible in a federal trial,[11] but this so-called rule of the *McNabb* case does not limit the power of a state court to admit or exclude evidence. This Court made that clear in the *McNabb* case itself.[12] Texas has specifically rejected the doctrine and holds that a confession made before charges are filed must be

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[9] *Stroble v. California*, 72 S. Ct. 599 (1952); *Gallegos v. Nebraska*, 72 S. Ct. 141 (1951); *Lyons v. Oklahoma*, 322 U. S. 596 (1944); *Lisenba v. California*, 314 U. S. 219 (1941).

[10] Article 217, Texas Code of Criminal Procedure (Vernon 1948), reads as follows:

> "In each case enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order."

[11] *Upshaw v. United States*, 335 U. S. 410 (1948); *McNabb v. United States*, 318 U. S. 332 (1943).

[12] 318 U. S. at p. 340.

excluded only if there is a causal connection between the failure to file a complaint and the securing of the confession." The Court of Criminal Appeals did not find any such casual connection in the case at bar.

Any question as to the applicability of *McNabb* rule to state criminal trials was conclusively settled by this Court in its recent decision in *Gallegos v.* Nebraska." There the accused, a Mexican farm hand who could neither read nor write English, was illegally detained for 25 days. During the course of this detention he confessed that he had slain his paramour. However, there was no undisputed evidence that he had been compelled to make his confession, so it was held that the issue of federal due process was not properly raised. In other words, the mere fact that the accused confessed before charges were filed did not of itself render his statement inadmissible as a matter of law.

"Illegal acts, as such, committed in the course of obtaining a confession, whatever their effect on its admissibility under local law, do not furnish an answer to the constitutional question which we must decide."" To exclude the confessions in the instant proceeding after sustaining the admissibility of those used in the respective trials of the *Gallegos* and *Lisenba* cases would certainly be inconsistent.

What has been stated above is applicable only to the question of the admissibility of petitioner's first confession. As to his second confession, he cannot

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" *Shook v. State*, 244 S. W. 2d 220 (Tex. Crim. 1951); *Dimery v. State*, 240 S. W. 2d 293 (Tex. Crim. 1951).
" 72 S. Ct. 141 (1951).
" *Lisenba v. California, supra*, p. 235.

even raise the objection of illegal detention, for it was not made until after he had been formally charged with the commission of the crime. Although there were two confessions used in evidence at petitioner's trial, this proceeding is not analagous to the "two confession" cases[77] because here both of the confessions were purely voluntary. In the absence of an involuntary first confession there is no necessity for an inquiry into the possible effect of the circumstances under which it was made upon any subsequent statements of the accused.

"A criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect federal constitutional rights."[78] Such drastic action is not required here. Acting under an instruction to find petitioner not guilty if it had any reason to believe that either of his confessions was not purely voluntary (R. 6), the jury found him guilty as charged. Thus the issue of coercion has already been resolved against him, and the mere fact that the confessions were made while petitioner was in the custody of the police does not render them inadmissible.

Due process of law, as applied to the trial of one charged with a crime, requires only that fundamental fairness which is essential to our basic concepts of justice. No such fundamental principle of justice was violated during the trial of this proceeding.

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[77] Cf. *Lyons v. Oklahoma, supra.*

[78] *Gallegos v. Nebraska, supra,* p. 145.

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court and that the petition for writ of certiorari should be denied.

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October, 1952.

APPENDIX

TEXAS STATUTES REGARDING CONFESSIONS

Texas Code of Criminal Procedure (Vernon 1948):

Article 726. Confession.

"The confession of a defendant may be used in evidence against him if it appear that the same was freely made without compulsion or persuasion, under the rules hereafter prescribed."

Article 727. When confession shall not be used.

"The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed.

If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness."

Article 727a. Evidence not be be used.

"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."